DOCUMENT RESUME

ED 079 766 CS 200 662

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TITLE Compulsory Disclosure by Newsmen: The Implications of the Legal Heritage for the Contemporary Situation.
PUB DATE Aug 73
NOTE 37p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (Fort Collins, Colorado, August, 1973)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Censorship; *Civil Liberties; Communication (Thought Transfer); *Court Litigation; Dissent; *Freedom of Speech; Individual Power; Information Networks; Journalism; *News Media

ABSTRACT

In the almost 100 years of reported litigation pertaining to compulsory disclosure of news sources, the basic pleadings asserted in common law cases have included employer's regulations, professional ethics, self-incrimination, lack of jurisdictional authority, and relevancy. American courts have consistently denied an evidentiary privilege for newsmen under common law. Even with the shift in emphasis to the enactment of state statutes to provide a shield for newsmen, courts have generally upheld the precedent rulings. This controversy can be satisfactorily resolved if Congress will define public policy provisions of the First Amendment by enacting a definitive statute that safeguards the unrestricted flow of information and inhibits use of the subpoena to force disclosure by newsmen of their sources and information. (Relevant primary legal documents reported by January 1973 were the basis of this analysis.) (EE)

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COMPULSORY DISCLOSURE BY NEWSMEN: THE IMPLICATIONS OF THE LEGAL HERITAGE FOR THE CONTEMPORARY SITUATION

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Annual Convention - August, 1973

CS 200 662

The purposes of this study were to investigate the evolution and status of the law pertaining to the compulsory disclosure of sources and information by newsmen, and to ascertain implications of this legal heritage for a resolution of the continued conflict of interests.

Relevant primary legal documents reported by January, 1973, were the basis of the analysis. These included American court decisions on cases pleading a common law evidentiary privilege for newsmen, state statutes providing a shield for newsmen against compulsory disclosure, court cases construing the several newsmen privilege statutes, and court decisions on cases pleading a constitutional protection against compulsory disclosure of news sources and information (see Eshelman and Barbour, 1973).

THE COMMON LAW PLEADINGS AGAINST COMPULSORY DISCLOSURE

In the almost one hundred years of reported litigation on matters of compulsory disclosure of news sources, a wide variety of defenses have been asserted. The basic pleadings in the common law cases included: employer's regulations, professional privilege, forfeiture of estate, code of professional ethics, self-incrimination, lack of jurisdictional authority, and relevancy.

American courts have been consistent in their denial of an evidentiary privilege for newsmen under the common law. Reported court cases pleading a common law privilege for newsmen spanned the years

from 1874 to 1969. In the almost one hundred years from the first reported case to the date of this study, there were three eras of more extensive litigation. During the period of 1886 to 1901 there were five of the seventeen cases, between 1911 and 1920 there were five cases, and between 1950 and 1961 there were four cases. One case preceded these groupings (1874), a second was isolated between 1920 and 1950 (1936), and a third was decided in 1969 along with a constitutional issue. It was, however, the 1936 case of People ex rel. Mooney v. Sheriff of New York County to which all later courts referred as the basic precedent in the line of stare decisis.

Employer's Regulations

The first reported case on the issue of compulsory disclosure of news sources was People ex rel. Phelps v. Francher (1874). This defense against compulsory disclosure in this case was that the rules of the employer forbade the disclosure of the name of the informant. This theory was summarily rejected by the court when it stated:

> As the law now is, and has for ages existed no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it (2 Hun 266).

As a consequence, the defense of employer's regulations was not relied upon in future cases.

Professional Privilege

The second defense to compulsory disclosure of sources by newsmen

emerged in the next series of cases. In Pledger v. State (1886) the court held the publisher to be a competent witness, and would be considered the author of the libelous article if he refused to reveal the identity of the actual author. In Chapman v. United States (1895) the court almost appeared to be using compulsory disclosure as a means of saving the press from itself.

> Let it once be established that the editor or correspondent cannot be called upon in any proceeding to disclose the information upon which the publication in his journals are based, and the great barrier against libelous publication is at once stricken down, and the greatest possible temptation created to use the public press as a means of disseminating scandal, thereby tending to lessen, if not destroy, its power and usefulness (Sen. Misc, Doc. 279 at 856; D'Alemberte, 1969, p. 313).

Other cases following which were denied the defense of professional privilege included People v. Durrant (1897), Ex parte Lawrence (1897), Clinton v. Commercial Tribune Co. (1901), In re Grunow (1913), In re Wayne (1914), and People ex rel. Mooney v. Sheriff of New York County (1936).

The ratio decidendi of the court in the Mooney case, as in the majority of the common law cases, was that the policy of the law was to require the disclosure of all information by witnesses in order that justice might prevail. It was held that a ruling providing for such a privilege would be a departure from the general tradition of the law of evidence and the specific previous rulings on newsmen and informants. Where an evidentiary privilege did exist, the tendency had been to restrict that privilege and not expand the privilege to

whom the privilege was granted nor to include additional classes of persons. And finally, that if such a privilege was to be granted, it was the responsibility of the legislative branch of government to make such public policy.

The logical extension of this defense was to assert the forfeiture of estate theory and the newsman's professional code. These defenses are discussed in subsequent sections.

Forfeiture of Estate

In Plunkett v. Hamilton (1911) the newsman argued that to answer the question put before him would cause him to forfeit his estate, specifically, it would cause him to lose his means of earning a livelihood. The court rejected the claim as without merit, and added that a promise not to testify when so required was substantially a promise not to obey the law. Such promises, the court commented, cannot be recognized except when subordinated to the requirements of the law.

In the case, In re Wayne (1914), the reporter asserted that he would lose his position if he breached his professional ethics. The court rejected his claim that the effect of disclosure upon the future availability of news would cost him his job.

A third case, Joslyn v. People (1919) asserted that the publisher might influence civil litigation if he revealed his private, confidential and personal business (the information as to the author of an article). The court held that a witness, even though a publisher,

may not refuse to testify because of his self interests.

Code of Professional Ethics

The fourth pleading of defense against compulsory disclosure of news sources was that to do so would violate a basic professional ethic. This was first asserted in the cases, In re Grunow (1913) and In re Wayne (1914). It was noted that this canon of the fourth estate was worthy of respect and undoubtedly well-founded, in the case, In re Wayne. However, it was held to be subject to the qualification of the interests and must yield to the administration of justice.

The concepts of the newsman's code, which obligated a journalist not to reveal who gave him information, were well established in the late 1800's. In fact, it had been held libelous to publish a statement to the effect that a reporter had violated a confidence in the defamation case of Tryon v. The Evening News Association (1878). By the 1930's, however, the "Canons of the Fourth Estate" had become widely asserted (Bird and Merwin, 1942; Comment, 2 Stanford Law Review 541, 1959; Desmond, 1949).

In Clein v. State (1950) the court relied upon the decision in the case, In re Wayne, to deny an evidentiary privilege to a newsman who asserted the professional canon of ethics as a defense. Likewise, the court ruled in the case, In re Goodfader's Appeal (1961), that disclosure was mandatory over a breach of professional ethics.

Self-incrimination

In Burdick v. United States (1915) the city editor refused to reveal the sources for an article written charging customs frauds. His defense was that a response would tend to incriminate him. On appeal to the Supreme Court of the United States it was held that he did not have to accept the pardon of the President and answer the question. Thus, in this case, the Fifth Amendment served as a valid defense to compulsory disclosure. It should be noted, however, that in the more recent rulings of the Supreme Court of the United States in the cases of Kastigar v. United States (1972) and Zicarelli v. New Jersey State Commission of Investigation (1972) it was held that when immunity was granted the witness was compelled to respond. Therefore, the ruling in Burdick would possibly be reversed if a similar situation was decided by the high court in 1973.

A second case asserting a form of self-incrimination as a defense to compulsory disclosure was in Joslyn v. People (1919). In that case the reliance was not upon the Fifth Amendment, but rather upon the ground that the matter was private, confidential and personal business which might serve to incriminate him. That argument was not accepted by the court.

Lack of Jurisdictional Authority

In two cases the defense to compulsory disclosure was that the court lacked the authority. In Ex parte Taylor (1920) the witness refused to appear before a notary public in Texas to give his testimony which was

to be used in an Illinois court. He was held in contempt, and upon appeal to the Texas Supreme Court it was affirmed that courts of justice of different countries or States are under a mutual obligation to assist each other in obtaining testimony upon which the right of a cause may depend. It held that there must be the judicial power to prevent what may otherwise amount to the defeat of justice through the recalcitrant conduct of a material witness.

In another jurisdictional dispute it was held by a federal court that the relevant law of Texas was binding in Adams v. Associated Press (1969). The court further ruled that the law of Texas would be the same as under the common law of other states unless there was a statute or case holding otherwise.

Relevancy

The defense to compulsory testimony that the material sought was irrelevant or immaterial to the proceedings was asserted in numerous cases. The first such case was Clinton v. Commerical Tribune Co. (1901). The court held, however, that the witness did not have the shield against compulsory disclosure on this basis, as the questions were material to the deposition and case before the bench.

During the period of years spanning 1888 to 1920 the common law of England derived a narrow era of privilege for newsmen based upon the court's decision in Hennesy v. Wright (1888). In that case the Court of Appeal refused to order the defendant to answer certain interrogatories involving the disclosure of the identity of his informants. The court held that the identity was "irrelevant" to the central issue

under litigation. In several later libel cases Hennesy was relied upon to declare the particular information sought irrelevant (Carter, 1960). The basis of this rule, however, was shifted from "relevance" to "privilege" in the case, Plymouth Mutual Cooperative & Industrial Society v. Traders" Publishing Association (1906). This rule of privilege was solidified in the subsequent cases, notably Adam v. Fisher (1914) and Lyle-Samuel v. Odhams, Ltd. (1920).

The second case using the defense of relevancy was Rosenberg v. Carroll, In re Lyons (1951). In this case the court held that the newspaper correspondent was not privileged, but that the material sought was in fact not material to the issue before the bench. Therefore the defense was successful in this instance, but not in establishing a "privilege" as in the English cases.

Closely related to the defense of relevancy was the defense asserted in United States v. Rumely (1953). In this case the Supreme Court of the United States held that the material sought by the legislative investigation was not within the scope of the activities authorized by Congress, and therefore the committee was without power to exact the information sought from the respondent. This case was the forerunner of the constitutional defense cases, in that the court did not specifically deal with the constitutional issues involved in the case, but noted that they were germaine. If the court had not ruled for the newsman on the issue of appropriateness of the committee's investigation they would have been forced to consider the

constitutional issue. But, in keeping with the tradition of the court, the ruling was limited to the first dispositive issue in the case. In a concurring opinion, however, Justice Douglas, with whom Justice Black concurred affirmed the constitutional issue as valid and would so hold. This dicta, however, did not become established law in the United States.

Two other cases relied upon the relevancy defense. In Brewster v. Boston Herald-Traveler Corp. (1957) the court declined to create common law protection consistent either with the courts basing their decisions upon state statute, or with the early English decisions discussed above. In Garland v. Torre (1958) the court held that in this defamation proceeding the source of information in an allegedly libelous article was in fact relevant to the proceedings, and therefore must be disclosed. As a result of these decisions the common law of England failed to become applied in American jurisdictions, and the later cases failed to seize upon the Rosenberg (1951) and Rumely (1953) relevancy ruling to establish a common law of privilege for newsmen.

THE STATUTORY DEFENSE TO COMPULSORY DISCLOSURE

Following the initial surge of common law cases which denied the evidentiary privilege to newsmen, emphasis in the law of compulsory disclosure of news sources shifted to the enactment of state statutes to provide for a shield for newsmen. In general it was observed that

the nineteen state statutes in force at the time of this study varied in their provisions (see Table 1).

In 1896 the legislative assembly of Maryland enacted legislation which made it the public policy of that state to permit newsmen to decline to reveal the sources of their information. By December, 1972, eighteen other states had provided some measure of protection for newsmen against compulsory disclosure of news sources and in some cases the news material itself. During 1973 an additional four states enacted legislation to provide a privilege for newsmen, but these provisions were not in force at the time of the investigation and were not included in this report (see Table 2).

In general, it was observed that the court's interpretation of the statutes tended toward a more uniform interpretation of the statute provisions in strict construction of the statutes and toward the tradition of the common law. The basic rationale was that unless the legislature had specifically made an exclusion to the general rule of compulsory disclosure, then the fact situations distinguishable from the provisions of the statute would fall under the common law rule. Thus the courts did not extend the statute provisions to protect any person, media, or element not specifically provided for in the statute. Likewise, the courts generally spoke or reasoned with disdain regarding the evidentiary privilege provided for newsmen as a class of persons.

The present investigation included an analysis of the nineteen state statutes and the litigation arising under their provisions. The first reported litigation arising under the several

TABLE 1: SUMMARY OF PROVISIONS OF THE STATE NEWSMAN'S SHIELD STATUTES

STATE ()Indicate Amendments	YEAR OF ENACTMENT (Amended)	PERSON PROTECTED	MEDIA INCLUDED IN PROTECTION	DEGREE OF PROTECTION	WHERE PRIVILEGE MAY BE ASSERTED	WHAT WAS PROTECTED	OTHER CONDITIONS OF PRIVILEGE
Alabama	1935 (1949)	Engaged in, connected with, or employed	Any newspaper (or radio or television station)	Absolute	Anywhere	Source	Publication required for protection. Obtained in newsgathering capacity.
Alaska	1967	Regularly engaged in collecting, writing, presentation	Newspaper, periodical, newsreel, broadcast, press association	Conditional, subject to appeal to superior court or supreme court	Anywhere	Source	Protection extended to shield source once privilege is claimed by newsman. Protection continued after employment.
Arizona	1937 (1960)	Engaged, connected with or employed by	Newspaper (radio or television)	Absolute	Anywhere	Source	Obtained in newsgathering capacity
Arkansas	1936 (1949)	Any editor, reporter, other writer, publisher manager, or owner	Newspaper, periodical or radio station	Conditional; disclosure compelled upon proof of bad faith, malice, and not in the interests of the public welfare	Anywhere	Source	Publication required for protection
California	1935 (1965) ((1971))	Publisher, editor, reporter, or other persons connected with or employed ((protection extended to continue to persons who leave the employ))	Newspaper, (press association, wire service, radio or television)	Absolute	A court, the legislature or any administrative body; immunity from contempt	Source	Protection only from being adjudged in contempt; procured for publication. Publication required for protection. Privilege continued after employment.
Illinois	1971	A reporter during the course of his employment	Newspaper or other periodical issued at regular intervals and having a paid general circulation; news service; radio station; television station; CATV service; newsreels service	Conditional; appeal procedure specified to divest the privilege. Protection not available in defamation action to which reporter or medium is a party defendant	Any court	Source of any information; person or means from or through which the news or information was obtained	Obtained in newsgathering capacity
Indiana	1941 (1949)	Owner or reporter engaged in legitimate newsgathering or dissemination	Newspapers subject to longevity and circulation requirements, recognized press association, (radio or television)	Absolute	Any legal proceeding	Source	Protection exists whether published or not. Obtained in newsgathering capacity.

STATE ()Indicate Amendments	YEAR OF ENACTMENT (Amended)	PERSON PROTECTED	MEDIA INCLUDED IN PROTECTION	DEGREE OF PROTECTION	WHERE PRIVILEGE MAY BE ASSERTED	WHAT WAS PROTECTED	OTHER CONDITIONS OF PRIVILEGE
Kentucky	1936 Reenacted 1952	Any person; engaged or employed or connected with the media	Newspaper, radio, television	Absolute	Anywhere	Source	Publication required for protection
Louisiana	1964	Reporter: any person regularly engaged in the business of collecting or preparing news for publication; includes persons previously so connected with media	Any newspaper or periodical issued at regular intervals and having a paid general circulation, press association, wire services, radio, television, and newsreels	Conditional; appeal procedure to revoke the privilege. Burden of proof upon newsman to establish publication in good faith	Anywhere	Identity of any informant or any source of information ...from another person	Protection continued after employment
Maryland	1896 (1951)	Any person connected with or employed by the media	Newspaper, journal, (radio, television)	Absolute	Anywhere	Source	Publication required for protection. Obtained in newsgathering capacity
Michigan	1949	Reporter and informant	Newspapers or other publications	Absolute for provisions of the Code of Criminal Procedure	Any inquiry authorized by the Code of Criminal Procedure	Communications between reporters and their informants	None
Montana	1943 (1951)	Persons engaged for the purpose of gathering, editing, disseminating news	Any newspaper, press association, (radio or television)	Absolute	Anywhere	Source	Obtained in newsgathering capacity
Nevada	1969	Reporter or editorial employee	Newspaper, periodical, press association, radio or television station	Absolute	Anywhere	Source	None
New Jersey	1933 Reenacted 1960	A person engaged on, connected with, or employed by media	A newspaper	Absolute unless waived by contract or partial disclosure by newspaper	Not specified --presumed anywhere	Source, author, means, agency or person from or through whom obtained	Publication required for protection.
New Mexico	1967	Person regularly engaged in collecting, writing, or editing, including prospective coverage after employment	Newspaper or other periodical issued regularly and with paid general circulation, press association, wire service, radio, television	Conditional, subject to situations balanced by court (if essential to insure justice)	Anywhere	Source	Obtained in newsgathering capacity. Privilege continued after employment.

STATE ()Indicate Amendments	YEAR OF ENACTMENT (Amended)	PERSON PROTECTED	MEDIA INCLUDED IN PROTECTION	DEGREE OF PROTECTION	WHERE PRIVILEGE MAY BE ASSERTED	WHAT WAS PROTECTED	OTHER CONDITIONS OF PRIVILEGE
New York	1970	Professional journalist or newscaster, professionally employed or otherwise associated in a newsgathering capacity	Newspaper, magazine, news agency, press association, wire service, radio or television station or network	Absolute	Anywhere there is contempt power	Any news or the source of any such news	Shielded only from contempt. Publication required for protection. Obtained in newsgathering capacity.
Ohio	1953	Person engaged or connected with or employed for the purpose of gathering, procuring, compiling, editing, disseminating or publishing news	A newspaper or press association	Absolute	Anywhere	The source of any information	Obtained in newsgathering capacity
	1959	Person engaged in the work of, or connected with, or employed by broadcast media for the purpose of gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news	Any commercial radio or commercial television station or network of such stations	Absolute	Anywhere	The source of any information	Obtained in newsgathering capacity. Subject to requirement of retaining a record thereof for six months
Pennsylvania	1937 (1959)	Person engaged on, connected with or employed by the media for the purpose of gathering, procuring, compiling, editing or publishing news	Newspaper of general circulation, press association (magazines of general circulation, radio and television)	Absolute	Anywhere	Source	Broadcast stations subject to requirements of retaining a record thereof for one year
Rhode Island	1971	Person, in his capacity as a reporter, editor, commentator, journalist, writer correspondent, newsphotographer, or other person directly engaged in the gathering or presentation of news	Any accredited newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station	Conditional; method of appeal in re-exempted material and criminal matter; pleadings of defense in defamation waives privilege	Anywhere	Confidential association, any confidential information or the source of any confidential information, except in defamatory litigation or published matters on a grand jury proceeding	Originate in confidence. Obtained in newsgathering capacity. Information published, broadcast or otherwise made public not protected

TABLE 2

CHRONOLOGICAL ORDER OF STATES

ENACTING NEWSMAN'S SHIELD STATUTES

Date of Enactment	State	Date of Enactment	State
1896	Maryland	1964	Louisiana
1933	New Jersey	1967	Alaska
1935	Alabama	1967	New Mexico
1935	California	1969	Nevada
1936	Arkansas	1970	New York
1936	Kentucky	1971	Illinois
1937	Arizona	1971	Rhode Island
1937	Pennsylvania	1973	Nebraska*
1941	Indiana	1973	North Dakota*
1943	Montana	1973	Oregon*
1949	Michigan	1973	Tennessee*
1953	Ohio	1973	Minnesota*

*Not in force at the time of this investigation.

state privilege statutes was in 1943 (State v. Donovan) which tested the New Jersey law of 1933. There were sixteen reported cases in which newsmen relied upon the provisions of the statutes as their defense.

The litigation arising under the shield legislation provided court construction of the applicability and provisions of the statutes. The issues were on the person protected, the media included in the shield, the degree or waiver of protection, the place where the shield could be asserted, the elements included in the protection, and other conditions of the privilege.

Sixteen court cases were reported wherein the defendant relied upon a state privilege code. There were only four cases wherein a basic issue was resolved in favor of the newsman, one of which was negated by a subsequent ruling by the court. As a consequence, in only three cases were newsmen successfully able to defend against compulsory disclosure in reliance upon a state statute. In contrast, eleven cases ruled against the newsman who relied on the defense of the statute. Two other cases defined who was protected by the code, and ruled that in that state the privilege was at the discretion of the newsman, not the informant.

Person Protected

Three cases defined the person protected by the statutes. In Farr v. Superior Court, County of Los Angeles (1972) the court held that the reporter lost his immunity when he left employment as a

journalist. In Lipps v. State (1970) and Hestand v. State (1971) the courts affirmed that the privilege created by the Indiana code was discretionary for the newsman, and he was not bound by the statute, but could waive the privilege.

Media Included

Two cases ruled on the media included in the statutes. In Deltec, Inc. v. Dunn & Bradstreet, Inc. (1960) the court barred a periodical from the provisions of the statute since the term "periodical" was not specifically included in the wording of the statute. Likewise, in the case In re Cepeda (1964) the court held that since a "biweekly periodical" was not specified in the statute the privilege was not to be granted to the applicant (see Table 3).

Degree of Protection

One of the favorable rulings for newsmen came in the case In re Howard (1955). In this case the court held that grammatical constructions such as quotation marks did not ascribe to a statement the source of information, and therefore there was no waiver of the privilege.

In three subsequent cases, however, the courts held that certain elements created a waiver of the statutory privilege. In Brogan v. Passaic Daily News (1956) the court held that ascription of information to "a reliable source" created a waiver, and disclosure of that source could be compelled. In Beecroft v. Point Pleasant Printing and Publishing Co. (1964) the courts declared there was a waiver of the privilege when the defendant also relied upon the defense of fair comment,

TABLE 3

MEDIA SPECIFIED BY STATE STATUTE
BY ORDER OF ENACTMENT

	Original Enactment	Newspaper	Press Association	Periodical	Newsreel	Radio	Television	Broadcast Network	Wire Service	Other Media
Maryland	1896	1896				1951	1951			journal
New Jersey*	1933	1933								
Alabama	1935	1935				1949	1949			
California	1935	1935	1965			1965	1965		1965	
Arkansas	1936	1936		1936		1949				
Kentucky	1936	1936				1952	1952			
Arizona	1937	1937				1960	1960			
Pennsylvania	1937	1937	1937	1959		1959	1959			
Indiana	1941	1941	1941			1949	1949			
Montana	1943	1951	1951			1951	1951			
Michigan	1949	1949								Other publications
Ohio	1953	1953	1953			1959	1959	1959		
Louisiana	1964	1964	1964	1964	1964	1964	1964		1964	
Alaska	1967	1967	1967	1967	1967	1967	1967	1967		Wire and facsimile
New Mexico	1967	1967	1967			1967	1967		1967	
Nevada	1969	1969	1969	1969		1969	1969			
New York	1970	1970	1970	1970		1970	1970	1970	1970	News agency
Illinois	1971	1971		1971	1971	1971	1971			CATV, news service
Rhode Island	1971	1971	1971	1971		1971	1971		1971	Newspaper syndicate

*Reenacted 1960

good faith, and reasonable belief. In the case In re Bridge (1972) the court held that disclosure of the source created a waiver, and the newsman could be compelled to reveal unpublished information.

Elements Protected

The question of whether the statutes protected only the source of information or whether the information obtained was privileged matter was the most litigated element of the shield statutes.

The first case asserting the state code as a defense was State v. Donovan (1943). In this case the newspaper had published a series of press releases written by identified authors. The issue was whether the privilege to protect a source included the messenger who physically carried the articles to the newspaper. The court held that the messenger was not the source that was protected.

In Ex parte Sparrow (1953) a federal district court ruled on two issues. The first was that the law of the state with a privilege statute would apply to the case (Alabama). The second issue was whether the person who served as informant was to be compelled to reveal his sources of information for the facts used in an article. The court held that the shield statute of Alabama provided protection for the source of information.

Ten years later, the Pennsylvania Supreme Court ruled in the case In re Taylor (1963) that the state shield code applied to information gained in addition to the source. This was the singularly most generous court construction of a state shield, and was later

to be severely criticized by the courts of other jurisdictions when they were confronted with similar pleadings.

In State v. Sheridan (1967) the court held that relevant information must be divulged by the newsman, since only the source and not the information itself was privileged from disclosure. In Branzburg v. Pound (1970) the court ruled that the newsman who saw an event was the source of information, and that the information observed could not be privileged from disclosure. In Lightman v. State (1972) the court held that when the reporter published a story on an event which he witnessed, he became the informer. Since the information (persons and events witnessed) was not privileged, compulsory disclosure was appropriate. And in the case In re Bridge (1972) the term "source" was not extended to include that part of the informant's statement which was not published.

Other Conditions

Another condition of privilege was asserted by the court in People v. Wolf (1972). In that case the court held that since the statute was silent on the matter, the common law requirement for privileged matter that the communication originate in confidence was binding. Thus, since there was not a specific understanding that the communication was in a situation of confidence, the statute did not apply and the newsman could be compelled to reveal his source of information.

Summary

During the past thirty years the courts have had numerous opportunities to hear the defense of a statutory shield to compulsory disclosure. In the sixteen reported cases only one court (In re Taylor, 1963) seized the opportunity to deviate from the authority of the common law which favored compulsory disclosure by newsmen. Two cases confirmed the validity of the defendant's claim, two defined the holder of the waiver of the privilege, and eleven cases distinguished the fact situation from the privilege provisions of the statutes.

The disdain of the courts for the public policy as determined by the legislative assemblies served to highlight the competing and conflicting interests in the issues of newsmen and compulsory disclosure. It would appear that the divergent positions of the newsmen and the courts have not been modified by the enactment of the public policy by the legislative assemblies. It would also appear that the divergent positions are more a result of heritage than of conciliatory understanding of the function of the institutions within the society.

THE CONSTITUTIONAL DEFENSE TO COMPULSORY DISCLOSURE

It was in 1958 that the first case arose in which the claim was made that the First Amendment exempted confidential news information from public disclosure. There were twelve reported cases based at least in part on the defense that the First Amendment provided protection from compulsory disclosure. Two of these cases were denied

certiorari (Garland v. Torre, 1958; State v. Buchanan, 1968) by the high court. One additional unreported case, which was a confrontation in a disbarment proceeding was appealed to the high court, but was denied certiorari (Murphy v. Colorado, 1961). Three cases did reach the Supreme Court of the United States (Caldwell v. United States, 1970; Branzburg v. Pound, 1971; In re Pappas, 1971). The high court ruled in these three cases of first instance in one decision (Branzburg v. Hayes, 1972). Subsequent to the ruling of the high court two additional cases were announced by courts of lower jurisdiction.

The first reported case to raise directly the constitutional issue was Garland v. Torre (1958). It was asserted that the First Amendment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil defamation suit. That defense was denied. Since then the constitutional defense has been almost uniformly rejected, although there was occasional dicta that, in circumstances not present, a news man might be excused from compulsory disclosure (In re Goodfader, 1961; In re Taylor, 1963; Murphy v. Colorado, 1961; State v. Buchanan, 1968; and State v. Knops, 1971). These courts applied the presumption of the common law against an asserted testimonial privilege, and concluded that the First Amendment interests used by the newsman as a defense were outweighed by the general obligation of a citizen to appear before a court of law, pursuant to a subpoena, and to give what information was demanded.

Several of the more recent cases, however, did recognize and give effect to some form of constitutional newsman's privilege

(Caldwell v. United States, 1970; In re Grand Jury Witnesses, 1970; along with four unreported cases: Aliota v. Cowles Communication, Inc., 1969; People v. Dohrn, 1970; People v. Davis, 1970; People v. Rios, 1970).

Two of the three cases accepted for review by the Supreme Court of the United States (Branzburg v. Pound, 1970; In re Pappas, 1971), an earlier case (Adams v. Associated Press, 1969), and two final cases announced prior to the decision of the high court (People v. Wolf, 1972; Farr v. Superior Court, County of Los Angeles, 1972) all declined to provide any form of a constitutional privilege for newsmen against compulsory disclosure.

The First Amendment argument was that to compel newsmen to disclose confidential sources of news would encroach upon the freedom of the press guaranteed by the First Amendment and thus would impose an important practical restraint on the flow of news from news sources to the news media and would thus diminish the flow of news to the public.

In affirming the denial of a constitutional defense (Branzburg v. Pound, 1970; In re Pappas, 1971) and in reversing the qualified constitutional privilege (Caldwell v. United States) afforded by the lower courts, the Supreme Court of the United States, in its case of first instance, held that there was neither a common law nor a constitutional protection for newsmen against compulsory disclosure of news sources or information. The decision came from a sharply divided court. The five justices in the majority included Justice White who wrote the

majority opinion, Chief Justice Burger, and Justices Blackmun, Rehnquist and Powell, who wrote a concurring opinion. The four justices who were recently appointed to the high court by President Nixon were all in the majority. The minority was composed of Justice Douglas, who wrote a dissenting opinion, and Justice Stewart, who filed a dissenting opinion in which Justices Brennan and Marshall joined.

An underlying implication of this study was that the courts in general, and the Supreme Court of the United States in particular, have moved from the common law position of compelling testimony in litigation to the consistent sequel of compelling testimony in the balancing of the First and Fifth Amendment provisions of the Constitution. Thus the traditional presumption of the preferred position of the First Amendment would appear to have been constricted (in its function of facilitating the flow of information within the society) in deference to the provisions of the Constitution for the grand jury (in its function of facilitating the discovery of possible criminal behavior by compulsory testimony).

THE CONTEMPORARY RESOLUTION: A PROPOSAL

The majority opinion of the Supreme Court of the United States in the Branzburg (1972) decision suggested three potential remedies to the confrontations between the newsmen and compulsory disclosure situations. The first was that the newsmen could appeal to the court by the motion to quash a subpoena served to compel testimony. Although there will undoubtedly be evidence of the success of such appeals, it

is doubtful, in light of the reported case history, that such motions will serve in any appreciable fashion to alleviate the tensions which have been imposed upon newsmen through the subpoena process. The favorable lower court rulings in Baker v. F and F Investment (1972), and the refusal of the high court to review the case (1973), was an exception to this trend.

The second remedy suggested by the high court was to appeal to the various state courts to respond in their own way to construe their own constitutions so as to recognize a newsman's privilege. In light of the heritage of common law and the results of case law interpreting privilege statutes, and the results of asserting the constitution as a defense to compulsory disclosure, this remedy would appear to be mute. Further evidence of the impotency of this remedy was offered by the courts in the cases reported in 1972 which were subsequent to the Branzburg (1972) decision (Lightman v. State, 1972; In re Bridge, 1972).

The first basic implication of this study derives from the decisions of the courts. The concept mentioned in the majority opinion in the Branzburg case and stressed in the concurring opinion that the holding of the court was of a limited nature, that the court would be receptive to legitimate First Amendment appeals by newsmen from compulsory disclosure, and that the court would not tolerate harassment of newsmen, has appeared to be an assurance of little value to newsmen. Newsmen felt that the fact situations in Branzburg, Caldwell and Pappas were legitimate First Amendment interests. Subsequent cases decided by lower courts on the basis of the Branzburg decision suggest that the newsman will not derive comfort from the

courts in their efforts to protect their sources. This implication was further confirmed by the denial of certiorari by the high court to the appeals of Farr (1972), Bridge (1973), and Lightman (1973).

Ideally, the resolution to the current crisis would have been a ruling by the Supreme Court of the United States providing either absolute or qualified First Amendment protection for newsmen. Since the problem emanates from the press-judiciary confrontation this would have been a more uniform and less hostile resolution. That was not the decision of the court, however, so alternative solutions must be explored.

The third remedy suggested by the high court was the enactment of federal or state legislation to grant a privilege against compulsory disclosure. In light of the heritage of the ineffectiveness of newsmen asserting the statutory defense to compulsory disclosure, this remedy would appear to require exceptional agility to effectively derive an adequate statute.

A second basic implication of this study derives from statute construction. The formation of a statute emanates from the intent of the legislative body establishing the public policy. If the intent would be to "protect press freedom" to "facilitate the flow of information within the democratic society" (preferred position for the First Amendment), the legislation would need to be absolute in its shield against compulsory disclosure of news sources and information. If the intent would be to lay the ground rules in the ad hoc balance between the First Amendment provisions for a "free press" and the

Fifth Amendment provisions for a "fair trial" the legislation would need to have extensive specificity and detail in order to insure the delimitation intended by the public policy established by the legislation. To the extent that the statute would violate the tradition of common law or the recent constitutional construction by the courts, the greater the need for definitive wording and inclusive provisions. Fact situations not included in a statute would be distinguished from the protective provisions and the rule of the common law would apply.

Four states responded in their way to resolve the dilemma in 1973. North Dakota (Editor & Publisher, March 31, 1973), Tennessee (Editor & Publisher, April 14, 1973), Oregon (Broadcasting, April 16, 1973), Nebraska (Editor & Publisher, April 21, 1973), and Minnesota (Press Censorship Newsletter, July-August, 1973) enacted legislation to provide some degree of protection for newsmen from compulsory disclosure.

During the early months of 1973 both houses of Congress were actively considering legislation to provide a remedy of relief to the compulsory disclosure issue. Representative Kastenmeier, chairman of a House Judiciary Subcommittee, held hearings on the forty-two bills (United States House of Representatives, 1973). Senator Ervin, chairman of the Senate Judiciary Subcommittee on Constitutional Rights, held hearings on the nine bills and one joint resolution (United States Senate, 1973). The outcome of these hearings in terms of specific legislation is uncertain. It should be noted,

however, that President Nixon has indicated (Broadcasting, November 13, 1972) his opposition to legislation to protect newsmen's confidential sources and information. He further stated his support of the Justice Department's guidelines on issuing subpoenas to newsmen. Such legislation, therefore might well face the fate of a Presidential veto.

An alternative approach to the resolution of the conflict in compulsory disclosure by newsmen lies in the provisions of the proposed Federal Rules of Evidence now before Congress. As proposed, these rules make no provision for a newsman-source confidential relationship, but do confirm the inviolability of the lawyer-client relation.

In light of the data discussed in this investigation, however, there emerges the persuasive mandate for the legislative branch of the federal government to define the public policy provisions of the First Amendment by the enactment of a definitive statute to safeguard the free flow of information and inhibit the chilling effect of the use of the subpoena forcing disclosure by newsmen of their sources and information.

It is conceded that the recommended resolution by the enactment of adequate federal statute (applicable in state judicial proceedings) is not a guarantee of a resolution to all the issues in this free press - fair trial confrontation. The overwhelming problem is the actual construction of the bill itself. As Senator Ervin stated, "This is the most difficult field I've ever had to write a bill in" (Newsweek,

April 2, 1973). In their effort to project the outcomes of statutes and potential litigation arising under the provisions of the codes, legislators must not only strike a balance between the apparent conflicting interests (newsmen and the flow of information versus courts and compulsory disclosure), but must also be cognizant of potential litigation arising under the provisions of the code (newsmen and confidential sources and information versus aggressive prosecutors) (Eshelman, 1973a).

The basic questions arising under such a projective analysis which must be resolved are these. 1. To whom should the privilege be granted, the professional journalist or any writer? 2. Which media should be included or specified? 3. Should the privilege be absolute or qualified (subject to a waiver or divestiture)? 4. Where may the privilege be asserted? 5. What should be protected, the source and/or the information not published?

On the basis of the data revealed in the present investigation it is proffered that the contemporary resolution to the problem of newsmen and compulsory disclosure lies in a statutory affirmation of the principles of the First Amendment applied to newsgathering and news dissemination. (See also Eshelman, 1973b; Graham and Landau, 1973).

Specifically, the following should apply:

1. That the protection be afforded to any person connected with, employed by, or associated in any newsgathering role for a news disseminating system. The statute should be consistent with the historic function of the First Amendment which has provided for freedom of expression for all, including the pamphleteer and the employee of an

extensive network system. The affirmation of this freedom should eschew any categorization (as licensing classifications), but cling tenaciously to the broad historic scope of the First Amendment applications.

2. That any medium serving the function of dissemination of information or opinion be included in the protection. Size of the organization, longevity of its existence, circulation of its product, or frequency of publication are irrelevant criteria. The basic criterion is the news disseminating function of the media, which includes the historic elements of information and criticism.

3. That only two waivers be applicable to the protection provided: First, by voluntary waiver of the protection by the newsgatherer or his disseminating medium which would apply in matters of sources of information or information of a confidential nature; and second, if not voluntarily waived, by the appropriate courts of appeal upon an adequate showing of compelling need only in matters of nonconfidential nature, such as the observation of a crime or footage of a demonstration.

4. That the protection may be asserted before any branch of government or its agencies or extensions in which the power of compulsory disclosure could otherwise be asserted. This would apply by federal code to both the federal and state jurisdictions. This provision is necessary in light of the diverse statute and case law in the state and federal jurisdictions.

5. That both the source of material and unpublished information be protected from compulsory disclosure. As stated in item three above, an absolute protection should be afforded for sources of information and confidential information. A qualified privilege should be afforded

nonconfidential information such as observations of the newsgatherer.

There is a basic consequential caveat to the proposed resolution, which is inherent in such grants. Senator Ervin stated:

> The same Congress which grants the privilege may condition it on proper conduct. A future Congress, irritated by a critical press, may hold repeal of the privilege as a threat to secure a more compliant press. What is now protective legislation may tomorrow be a hostage to good behavior (Time, March 5, 1973).

The intended outcome of this proposal is to give legal effect to the minority opinion of the Supreme Court of the United States in the Branzburg decision, by establishing a presumption of protection, as under the First Amendment. The risks involved, if any, are to err on the side of freedom rather than on the side of constraint.

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